88-1892

Supreme Court, U.S.
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No. -

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

OPERATING ENGINEERS PENSION TRUST,
et al.,
Petitioners,
VS.
THOMAS G. DANIEL, an individual doing business as
CONSOLIDATED CONCRETE PUMPING,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a court have jurisdiction under § 301 of the Labor Management Relations Act to declare a written collective bargaining agreement unenforceable based on negotiating conduct of the bargaining parties?

2. Do federal labor policies require judicial enforcement of an employer's written agreement specifying contributions payable to an employee benefit plan, regardless of any defense concerning the formation or existence of the agreement?

3. By amending ERISA in 1980, did Congress grant courts authority to award attorney's fees to a defendant employer who prevails in an action brought by employee benefit plans to collect delinquent contributions?

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Rule 21.1(b) of this Court, the parties in the Court of Appeals are listed as follows:

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, AND OPERATING ENGINEERS TRAINING TRUST,

Appellants below;

THOMAS G. DANIEL,

Appellee below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Operating Engineers Pension Trust, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit entered on October 21, 1988, in Case No. 87-6057 of that Court.

OPINIONS BELOW

The memorandum disposition of the Court of Appeals is not officially reported, but appears in Appendix A of this petition. The order of the Court of Appeals withdraw-

ing its opinion and substituting the memorandum disposition is officially reported at 859 F.2d 808 and appears in Appendix B. The opinion of the Court of Appeals was first officially reported at 850 F.2d 603, but the official report has been withdrawn and the opinion appears in Appendix C. The findings of fact and conclusions of law of the U. S. District Court for the Central District of California are not officially reported and appear in Appendix D. The district court's judgment awarding costs and attorney's fees is not officially reported and appears in Appendix E.

JURISDICTION

The memorandum disposition by the Court of Appeals was filed and entered on October 21, 1988. A petition for rehearing and suggestion for rehearing en banc were denied and rejected by an order of the Court of Appeals filed and entered on April 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947, as amended ("LMRA"), 61 Stat. 156, 29 U.S.C. § 185(a), provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA") enacted by amendment contained in the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1295, 29 U.S.C. § 1145, provides as follows:

> "Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

Section 502(g) of ERISA, as amended by the MPPAA, 94 Stat. 1295, 29 U.S.C. § 1132(g), provides as follows:

> "(1) In any action under this subchapter (other than an action described in paragraph (2)), by a participant, beneficiary, or fiduciary, a court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> "(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce § 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of —
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20% (or such higher percentage as may be permitted under Federal or State

law) of the amount determined by the court under (A),

(D) reasonable attorney's fees and costs of the action to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate."

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under § 6621 of Title 26."

STATEMENT OF THE CASE

Petitioners ("Trusts") are four multi-employer employee benefit plans as defined by § 3(3) of ERISA [29 U.S.C. § 1002(3)]. Each of the Trusts was organized under § 302(c)(5) and (6) of the LMRA [29 U.S.C. § 186(c)(5), (6)] to receive employer contributions under collective bargaining agreements. Respondent Thomas G. Daniel ("Daniel") is an individual doing business as Consolidated Concrete Pumping in the construction industry of California.

On October 19, 1982, Daniel went to the offices of the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), in San Diego and met with Elbert Thomas, a business agent of Local 12. Daniel told Thomas he wanted to join Local 12 as an owner-operator. Thomas gave Daniel several copies of a four page document entitled Owner-Operator Short Form Collective Bargaining Agreement and a multi-copy one page form by which a signing employer acknowledges and agrees to abide by the trust agreement establishing each of the Trusts. In addition, Thomas gave Daniel four small forms relating to union membership: (1) a small card entitled Application

for Membership in Local Union No. 12; (2) smaller authorization card designating Local 12 as the collective bargaining representative of the applicant; (3) a yet smaller pledge card agreeing to pay union membership fees and dues; and (4) a one page designation of beneficiary form by which the applicant names the person to receive certain burial and death benefits from Local 12.

Thomas showed Daniel to a large table in Local 12's offices, where Daniel sat at the table and completed in his own handwriting the required information on each of the forms. After Daniel had fully completed and signed the Owner-Operator Short Form Collective Bargaining Agreement ("Short Form Agreement"), Thomas assisted Daniel in filling in the blanks of additional copies of the same document, which Daniel then signed. Daniel initialed the margin of page 3 where a box is marked to indicate the Master Construction Agreement is incorporated by reference into the Short Form Agreement. The Short Form Agreement as completed by Daniel identifies Consolidated Concrete Pumping as the owner-operator, recognizes Local 12 as the bargaining representative of any persons employed by Consolidated Concrete Pumping within the craft jurisdiction of Local 12, and requires Consolidated Concrete Pumping to apply the terms of the Master Construction Agreement to any such employees. The Master Construction Agreement obligates each employer to pay contributions to the Trusts on each hour of employment of covered employees.

Daniel testified at the trial that he read only the parts of the Short Form Agreement as necessary to fill in the blanks, including the name of his company, Consolidated Concrete Pumping, and his business address on pages 1 and 3. Daniel further testified that he asked no questions

of Thomas and had no discussion with Thomas about the content of the documents.

Daniel testified that he had requested the meeting of October 19, 1982, in a telephone call he made to Robert Mathews, another business agent of Local 12. The telephone call from Daniel to Mathews occurred after a series of discussions between Daniel and Mathews, and between Daniel and certain general contractors signatory to collective bargaining agreements with Local 12. Mathews had found Daniel working on two construction jobsites of signatory employers, and had told Daniel that he could not continue to work on such jobs without being signatory to an agreement with Local 12. Mathews further told Daniel that the signatory employers would have to pay fines for violating their agreements with Local 12. Daniel responded to Mathews that Daniel "couldn't sign my company up as union" because he "couldn't afford to pay the rates, the benefits and the scale that they wanted and stay in competition with my competition." At the request of a signatory employer, Daniel later called Mathews and met with him to discuss "sign[ing] up as an owner-operator". Those discussions covered the procedure by which an owner-operator of construction equipment could go on the payroll and become an employee of a signatory employer. However, the discussions involved "no mention of employees" or any obligations Daniel might have regarding such employees under a short-form collective bargaining agreement with Local 12. After the meeting with Mathews, Daniel spoke further with the signatory employers and then called Mathews to arrange the meeting of October 19, 1982. On October 19, Mathews contacted Thomas by car radio and asked Thomas to attend the meeting with Daniel because Mathews had a conflicting appointment.

Daniel testified that he had employees continuously after 1979, and that he had four employees in October, 1982. Mathews testified that Daniel had told him he had no employees. Daniel's testimony on the point is conflicting, but Daniel finally testified that he "assumed that [Mathews] knew I had employees . . . [but] I can't say as I told him . . ." Thomas wrote "no other employees except owner at this time" on page 4 of the Short Form Agreement, but Daniel denied telling Thomas that he had no employees and denied seeing Thomas write the note.

Daniel testified that he remembered signing the Short Form Agreement and the trust agreement acknowledgments last among the documents signed on October 19, 1982. Daniel further admitted that when he called Mathews to arrange the meeting of October 19, 1982, he understood what signing up as an employer meant, and "absolutely" understood that by signing up as an employer he would have an obligation to pay fringe benefit contributions on his employees.

After he signed the Short Form Agreement, Daniel reported none of his employees to the Trusts. In 1984, Mathews found a workman identified as an employee of Consolidated Concrete Pumping on the jobsite of another signatory employer. After receiving no response to a telephone call to Daniel, Mathews contacted the Trusts and suggested a payroll audit of Daniel's records. The Trusts sent Daniel three written requests for a payroll audit, but received no response. However, Daniel's counsel gave Local 12 a notice of termination of the Short Form Agreement.

The Trusts filed this action against Daniel in the U. S. District Court for the Central District of California to obtain a payroll audit and to enforce any contributions due under the Short Form Agreement. The audit was

conducted through discovery procedures, and found that employees of Daniel had performed covered work operating concrete pumps a total of 17,387.5 hours. The Trusts claimed delinquent contributions on the covered employees of $126,729.91, plus damages of $4,723.57 for breach of the subcontracting clause.

After the trial, the district court made findings of fact that Daniel did not read the Short Form Agreement prior to signing it; that under the circumstances existing on October 19, 1982, Daniel "reasonably and justifiably believed that the various documents signed by him involved only an application for union membership as an owner-operator . . .;" and that Daniel believed that it was necessary to execute the Short Form Agreement "to permit him to provide services and equipment to union-affiliated construction contractors as an owner-operator." The district court dismissed the complaint of the Trusts and entered judgment for Daniel, including an award of attorney's fees and special costs in the sum of $34,472.51.

On appeal, the Ninth Circuit first issued its opinion treating the reasonableness of Daniel's "belief" concerning the Short Form Agreement as a mixed issue of fact and law requiring *de novo* appellate review. *App.* C-6. The opinion held that Local 12 had no duty to explain the effects of the Short Form Agreement to Daniel and that Daniel was bound to the Short Form Agreement regardless of whether he chose to read it prior to signing. *App.* C-7, 8. However, upon petition for rehearing, the Ninth Circuit filed an order withdrawing the opinion (*App.* B-1) and issued its unpublished memorandum disposition. The memorandum treats the district court's determination of "reasonable and justifiable belief" as involving essentially an issue of negligence not to be disturbed unless "clearly erroneous." *App.* A-4. The Court of Appeals concluded

that the record contains sufficient support for the district court's finding that Daniel signed the Short Form Agreement and the Trust acknowledgments "reasonably believing they were something quite different than what they in fact were," and affirmed the judgment of the district court. *App.* A-4, 5. The memorandum did not discuss the Trusts' appeal of the district court's award of attorney's fees to Daniel. Daniel's later application to the Ninth Circuit for an award of attorney's fees incurred on appeal was denied.

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUITS ARE SPLIT REGARDING WHETHER COURTS HAVE JURISDICTION UNDER LMRA § 301 TO DECLARE THAT A WRITTEN COLLECTIVE BARGAINING AGREEMENT IS NOT A BINDING CONTRACT.

Labor relations conduct which is arguably protected or prohibited by § 7 or § 8 of the National Labor Relations Act ("NLRA") [29 U.S.C. § 157, 158] has been assigned by Congress to the exclusive primary jurisdiction of the National Labor Relations Board ("NLRB"). *I.L.A. v. Davis,* ____ U.S. ____, 106 S.Ct. 1904, 1911 (1986); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245, 79 S.Ct. 773, 780 (1959). Since its creation in 1935, the NLRB has exercised its jurisdiction to determine whether collective bargaining parties have reached an agreement and, if so, to order the parties to sign a written memorandum of the agreement reached. *H. J. Heinz Co. v. N.L.R.B.,* 311 U.S. 514, 523-26, 61 S.Ct. 320, 324-26 (1941). From the outset of the NLRA, Congress viewed the signing of the written contract as "the final step in the bargaining process," *id.,* 311 U.S. at 524-25, 61 S.Ct. at

325, and eventually added the express duty to sign a written agreement when § 8(d) of the NLRA was enacted in 1947 [61 Stat. 142, 29 U.S.C. § 158(d)].

> "The Board is not trespassing on forbidden territory when it inquires whether negotiations have produced a bargain which the employer has refused to sign and honor .... To this extent the collective contract is the Board's affair, and an effective remedy for refusal to sign is its proper business." *N.L.R.B. v. Strong,* 393 U.S. 357, 361, 89 S.Ct. 541, 545 (1969).

Thus, federal and state courts must defer to the exclusive competence of the NLRB to determine the existence of a collective bargaining agreement in order to avoid a "multiplicity of tribunals, ... diversity of procedures ... [and] incompatible or conflicting results," *I.L.A. v. Davis, supra,* 106 S.Ct. at 1911, unless Congress gave the courts concurrent jurisdiction by enacting § 301 of the LMRA.

Congress enacted § 301 to provide a judicial remedy for breach of a collective bargaining agreement in lieu of a proposal to make such a breach an unfair labor practice. H.R.Conf.Rep. No. 510, 80th Cong., 1st Sess., pp. 41-42.

> "*Once parties have made a collective bargaining contract,* the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (Emphasis added.) *Id.*, at 42.

Accordingly, with § 8(d) assuring NLRB jurisdiction over the signing of a written agreement as "the final step in the bargaining process," *see H. J. Heinz, supra,* § 301 authorizes a court action to remedy the breach of a contract the parties have already made. But § 301 jurisdiction of the courts "is applicable *only* to those disputes that are *governed by the terms of the collective bargaining*

agreement itself." (Emphasis added.) *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 300-01, 91 S.Ct. 1909, 1925 (1971). Negotiating conduct which may affect the validity of a written agreement made by the parties (*i.e.,* conduct violative of the statutory duty under §§ 8(a)(5) and 8(b)(3) [29 U.S.C. § 158(a)(5), (b)(3)] to bargain in good faith toward a written agreement)[1] is to be promptly remedied exclusively by the NLRB, but only if an unfair labor practice charge is filed within the six months limitations period of § 10(b) of the NLRA [29 U.S.C. § 160(b)]. *Machinists v. N.L.R.B.,* 362 U.S. 411, 424-26, 80 S.Ct. 822, 831 (1960).

Despite this statutory framework and case authority, the federal circuits are split regarding whether § 301 grants jurisdiction for courts to decide if a collective bargaining agreement exists. The First, Fourth and Seventh Circuits have held that § 301 provides no jurisdiction to decide whether a collective bargaining agreement exists. *Hernandez v. National Packing Company,* 455 F.2d 1252, 1253 (1st Cir. 1972); *A. T. Massey Coal Company v. International Union,* 799 F.2d 142, 146 (4th Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S.Ct. 1964 (1987); *NDK Corp. v. Local 1550,* 709 F.2d 491, 492-93 (7th Cir. 1983). The Third, Fifth, Tenth and Eleventh Circuits have taken the opposite view. *Mack Trucks, Inc. v. Auto Workers,* 856 F.2d 579, 586-90 (3rd Cir. 1988); *United Steel Workers of America v. Rome Industries, Inc.,* 437 F.2d 881, 882-83 (5th Cir. 1970); *McNally Pittsburg, Inc. v. Ironworkers,* 812 F.2d 615, 617-19 (10th Cir. 1987); *Board of Trustees v. Universal Enterprises,* 751 F.2d 1177, 1184 (11th Cir. 1985).

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[1] "The failure to sign a written memorandum of the agreement made has been uniformly regarded as a *per se* refusal to bargain." Morris, *The Developing Labor Law,* (2d Ed. Am.Bar Assn.), p. 566.

Some decisions of the Ninth Circuit, particularly cases implicating representational rights of employees under § 7 of the NLRA, have observed a strict limitation on § 301 jurisdiction. *See Glaziers & Glass Workers v. Custom Auto,* 689 F.2d 1339, 1342-45 (9th Cir. 1982) ["the exception to the primary jurisdiction doctrine provided by § 301 was designed to afford the courts jurisdiction to resolve labor disputes that focus on the interpretation of the *terms* of the collective bargaining agreement" (emphasis in original), and affords no court jurisdiction to entertain the employer's effort to "to avoid the entire agreement"], and *Local No. 3-193, Woodworkers v. Ketchikan Pulp*, 611 F.2d 1295, 1298-1301 (9th Cir. 1980); but *cf., Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321, 1325-26 (9th Cir. 1988), *cert. denied* ____U.S.____ (1989) [§ 301 applies "not only to suits for breach of a collective bargaining agreement once it is duly formed, but also to suits impugning the integrity and validity of a labor agreement"].

Determining the "existence" of a labor agreement may, at first glance, seem a logical and innocuous portion of the contract enforcement function of courts under § 301. However, a closer look quickly reveals grave dangers to the collective bargaining process and to the legislative assignment of jurisdiction to the NLRB to regulate that process. Going behind the written agreement to determine whether a binding contract exists, as the Ninth Circuit has done in this action, requires the court to focus attention upon the conduct of bargaining parties and their exchanges of communications *before* the agreement is signed. This places courts squarely in the middle of

regulating the bargaining process.[2] The Ninth Circuit decision gives power to federal and state judges and juries to declare written labor agreements null and void based on testimony about negotiations occurring several years past. This Court should grant review and settle this fundamental issue of federal labor policy.

II.

AMONG THE CIRCUITS WHICH DETERMINE THE EXISTENCE OF A COLLECTIVE BARGAINING AGREEMENT, A SPLIT EXISTS REGARDING WHETHER TECHNICAL RULES OF CONTRACT LAW OR PRINCIPLES OF FEDERAL LABOR POLICY GOVERN THE ISSUE.

The Third Circuit, for example, recently ruled as follows:

> "In determining whether a collective bargaining agreement exists, courts must look to federal labor relations law, not state contract law. . . . In the field of labor relations, the technical rules of contract law do not determine the existence of an agreement." *Mack Trucks, Inc. v. U.A.W.*, 856 F.2d at 591-92.

By contrast, the Ninth Circuit holds as follows:

> "[G]eneral principles of contract law apply to the formation of collective bargaining agreements, *see Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501, 1503-04 (9th Cir. 1984) [relying on state contract law and holding that the signing of a written collective bargaining agreement did not create a

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[2]The NLRB closely regulates the parties' duty to exchange information during labor negotiations. *See* Morris, *The Developing Labor Law, supra*, pp. 606-629.

> binding contract] . . . " *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1504 (9th Cir. 1986).[3]

See also, McNally Pittsburg, Inc. v. Ironworkers, supra, 812 F.2d at 621, [following *Gilliam* in holding a written collective bargaining agreement to be unenforceable based on "no mutual assent" because the signing official was in a hurry, did not read the agreement, and thought it was a different document].

In this action below, the Ninth Circuit carried application of state law to the extreme in declining to enforce employee benefit contributions due under a written collective bargaining agreement. Citing *Gilliam* and *Williston On Contracts* (*App.* A-4), the Court of Appeals ruled that Daniel would not be bound if he "reasonably believed" the Short Form Agreement he signed was "something quite different" and, moreover, "*whether [Daniel's] beliefs are reasonable is essentially a question of negligence* . . . ." The Ninth Circuit permitted the collective bargaining agreement to be nullified as a wholly subjective matter of "negligence" within the discretion of the district court as the trier of fact, based on the common law of contracts and unfettered by precepts of federal labor policy.

Assuming *arguendo* jurisdiction to decide whether a binding agreement exists, the Court should not permit the federal law of LMRA § 301 and ERISA § 515 to degenerate so drastically. Each collective bargaining agreement

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[3]Although the *Cecil Backhoe* decision of the Ninth Circuit cites *Gilliam*, the panel then proceeds to apply principles of federal labor policy (*i.e.*, bargaining parties are conclusively presumed to have equal bargaining strength, union agent has no duty to explain the terms of the agreement to the employer, alleged misrepresentation is not a defense, signing party is bound regardless of whether he reads it or considers its consequences) and enforces the agreement.

nullified in this *ad hoc* manner severely affects the long term retirement and short term health care interests of the employees covered by the written agreement. Granting the petition for review will allow resolution of this important conflict among the circuits.

III.

FEDERAL LABOR POLICIES APPLICABLE TO SUITS UNDER LMRA § 301 AND ERISA § 515 PRECLUDE DEFENSES WHICH UNDERCUT A WRITTEN AGREEMENT TO PAY CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN.

The substantive law applicable in § 301 cases "is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456, 77 S.Ct. 912, 918 (1957).

> "[S]ubstantive principles of federal labor law must be paramount in the area covered by the statute [so that] *issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy."* (Emphasis added.) *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 209, 105 S.Ct. 1904, 1910 (1985), quoting *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 103, 82 S.Ct. 571, 576 (1962).

Once such legal principles are fashioned and incorporated into the law of § 301, that law is to be applied uniformly and is intended to prevail over inconsistent state law. *Allis-Chalmers,* 471 U.S. at 209-10, 105 S.Ct. at 1910.

A central premise of federal labor policy is the requirement of LMRA § 302(c)(5)(B) [29 U.S.C. § 186(c)(5)(B)] that any employer payment to an employeee benefit plan administered in part by a representative of a labor union must be covered by *"a written agreement [specifying] the detailed basis on which such*

payments are to be made . . . " In enacting this requirement of § 302, Congress intended to inhibit corrupt practices affecting employee benefit plans and to provide increased security for the expectations of employees. Accordingly, the strong public policy underlying § 302(c)(5) prohibits oral modification of the written agreement specifying the payments to be made. *Waggoner v. Dallaire,* 649 F.2d 1362, 1366 (9th Cir. 1981). This rule of federal labor policy has been widely adopted by the federal courts. *See, e.g., Abbate v. Browning-Ferris Industries,* 767 F.2d 52, 55-56 (3rd Cir. 1985); *Mo-Kan Teamsters Pension Fund v. Creason,* 716 F.2d 772, 777 (10th Cir. 1983), *cert. denied* 464 U.S. 1045 (1984); *Trustees v. Pump House,* 821 F.2d 566, 568 (11th Cir. 1987); *Lewart v. Woodhull Care Center Associates,* 549 F.Supp. 879, 883 (S.D.N.Y. 1982). The prohibition against oral modifications has led, quite logically, to a new defense tactic designed to avoid the written obligations: allege that no agreement exists, relying on technical rules of contract law.

Since technical rules of contract law are often incompatible with the policy of LMRA § 302, and "precepts of federal labor policy . . . must be paramount," *Allis-Chalmers,* 471 U.S. at 209, 105 S.Ct. at 1910, § 302 should preclude any court litigation of a defense undercutting the written agreement. Any relief from the written agreement permitted by national labor policy should be obtained only through the NLRB on an unfair labor practice charge filed timely by the affected party. Congress has assigned the NLRB the central role in administering labor policy affecting the collective bargaining process, including "both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated . . . " *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 751, 105 S.Ct. 2380, 2395 (1985).

If LMRA § 302 leaves any room for doubt that Congress intended to bar defenses not apparent from the face of the written agreement, substantially the same national labor policy is compellingly expressed through ERISA § 515. Two courts of appeals have recently issued opinions concluding that § 515 bars *any* defense (except illegality of the promise to pay) against enforcement of the written agreement for employee benefit contributions, specifically including any defense directed to the formation or existence of the contract. *Central States Pension Fund v. Gerber Truck Service, Inc.*, ____F.2d ____, No. 87-2480, *en banc* (7th Cir. March 17, 1989) ["pension or welfare fund is like a holder in due course . . . or like the receiver of a failed bank . . . — entitled to enforce the writing without regard to understandings or defenses applicable to the original parties"]; *Bituminous Coal Operators Association, Inc. v. Connors*, 867 F.2d 625, 634-36 (D.C. Cir. 1989) ["employer may not defend on the ground of union misconduct in negotiating the agreement" or raise "defenses not apparent from the face of the agreement"].[4]

The memorandum of the Ninth Circuit makes no effort to reconcile its result reached under state contract law with these central premises of national labor policy. The petition should be granted to provide a clear exposition of the manner in which these national labor policies animate the law affecting judicial enforcement of employer payments due to employee benefit plans.

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[4]The Ninth Circuit earlier ruled that the only permitted defense is illegality of the agreement to pay contributions, *Southern California Retail Clerks Pension Fund v. Bjorklund*, 728 F.2d 1262, 1265 (9th Cir. 1984), but limited that holding in *Operating Engineers Pension Trust v. Gilliam, supra*, 737 F.2d at 1505, by permitting a defense directed to the existence of the agreement itself.

IV.

UNLESS THE TRUSTS PREVAIL, THE COURT SHOULD DETERMINE WHETHER CONGRESS INTENDED TO AUTHORIZE AN AWARD OF ATTORNEY'S FEES TO A PREVAILING EMPLOYER IN AN ACTION BROUGHT BY AN EMPLOYEE BENEFIT PLAN TO RECOVER DELINQUENT CONTRIBUTIONS.

As enacted in 1974, ERISA contained no federal cause of action for delinquent employer contributions, but authorized discretionary award of attorney's fees under § 502(g) [88 Stat. 892, 29 U.S.C. § 1132(g)] in actions brought under § 502(a) [88 Stat. 891, 29 U.S.C. § 1132(a)] to redress statutory rights. In 1980, the MPPAA added § 515 to ERISA to "simplify delinquency collection," *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 87, 102 S.Ct. 851, 861 (1982), and to encourage employers to pay contributions timely. *Central States Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 581, n. 22, 105 S.Ct. 2833, 2845 (1985). The same 1980 enactment amended § 502(g) of ERISA to require mandatory award of attorney's fees and other damages to employee benefit plans in any action in which delinquent contributions are recovered [94 Stat. 1295, 29 U.S.C. § 1132(g)(2)].

The Ninth Circuit has interpreted ERISA § 502(g)(1) as authorizing a discretionary award of attorney's fees to a defendant employer in an action in which an employee benefit plan is unsuccessful in recovering delinquent contributions. *Carpenters v. Russell,* 726 F.2d 1410, 1414-15 (9th Cir. 1984). The legislative history of the MPPAA supports only the contrary view, that Congress had no intention to enact for the first time a statutory basis for an award of attorney's fees to an employer who prevails in

a suit brought to enforce payment of delinquent contributions under ERISA § 515.

The Ninth Circuit affirmed without comment the award of more than $34,000.00 in attorney's fees and costs in favor of Daniel against the Trusts in this action. *App.* E-1. This decision runs directly contrary to the intent of § 515 of ERISA by rewarding an employer who successfully disputes a claim for contributions, and discourages vigorous pursuit of contract rights by plan fiduciaries. *Cf., Central States Pension Fund v. Central Transport, supra,* 472 U.S. at 580-81, 105 S.Ct. at 2845. The petition should be granted, if for no other reason, to resolve this important issue of federal law.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Dated: May 17, 1989

Respectfully submitted,

WAYNE JETT,*
JETT & LAQUER,
Counsel for Petitioner.

**Counsel of Record.*

APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs-Appellants,
v.
THOMAS G. DANIEL, an individual,
doing business as
CONSOLIDATED CONCRETE PUMPING,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

ARGUED AND SUBMITTED APRIL 6, 1988
PASADENA, CALIFORNIA

Filed: October 21, 1988
No. 87-6057
D.C. No. CV-85-5064-JGD

MEMORANDUM*

Before: BRUNETTI, KOZINSKI and THOMPSON,
Circuit Judges.
KOZINSKI, Circuit Judge.

Operating Engineers Pension Trust, et al. (Trust) appeals from the district court's judgment that Thomas G. Daniel was not bound by agreements between his company and Operating Engineers Union, Local 12 that,

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

by their terms, obliged him to make pension fund contributions for his employees.

Daniel, the owner and principal operator of Consolidated Concrete Pumping Inc., worked for several contractors who were signatories to a Master Labor Agreement with Operating Engineers Union, Local 12. Robert Mathews, a representative of Local 12, informed Daniel that he could not work for his signatory customers unless he joined the union. When Daniel stated that he could not sign his company up with the union because he "couldn't afford to pay the rates, the benefits, and the scale that [the union] wanted," Reporter's Transcript (RT) at 174, Mathews suggested that Daniel join the union as an owner- operator and then work as an employee for the general contractors. RT at 176. Daniel agreed.

On October 19, 1982, Daniel met with Elbert Thomas, a representative of Local 12 and told Thomas that he wanted to join Local 12 as an owner-operator. RT at 183. Thomas presented Daniel with a set of documents, four of which signed Daniel up as a union member and two of which bound his company under the San Diego Master Labor Agreement (MLA) between Local 12 and the Associated General Contractors of America, San Diego Chapter, Inc. The two latter agreements, a short form agreement between Consolidated Concrete Pumping, Inc. and Operating Engineers Union, Local 12, and an Acknowledgment and Acceptance of Trust Agreement, obliged Daniel to make contributions to the Trust based on the number of employees working for Consolidated Concrete Pumping, Inc.

After this meeting, Daniel resumed his operations as Consolidated Concrete Pumping; he never made any contributions to the union's trust funds. In 1984, Local 12 conducted an audit of Consolidated Concrete Pumping's

books and discovered Daniel owed over $120,000 in delinquent employee contributions. Plaintiff's Exhibit 13.

When Daniel refused to pay, the Trust brought suit pursuant to section 502(e)(1) of the Employee's Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(1) (1982) and section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) (1982). The Trust also sought damages for breach of the subcontracting clause, audit costs, 10% liquidated damages for late payment, and reasonable costs and fees, all totaling $145,886.33. Plaintiff's Exhibit 13.

After trial, the district court found that Daniel signed the short form agreement without reading it, Finding of Fact (FF) #11, Excerpts of Record (ER) at 28, and that he "did not think or understand that the signing of the short form agreement bound him under the MLA." FF #13, ER at 29. Further, the court found that Daniel "reasonably and justifiably believed that the various documents signed by him involved only an application for union membership as an owner/operator." FF #12, ER at 29. Accordingly, the court held that Consolidated Concrete Pumping was not bound by the short-form agreement and had no obligation to make pension fund contributions for its employees under the MLA. The court found it unnecessary to consider Daniel's alternate claim that he effectively repudiated the agreement under section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) (1982). Conclusion of Law #4, ER at 30. The court also awarded attorney's fees and costs to Daniel pursuant to 29 U.S.C. § 1132(g)(2) (1982).

In most cases, a party who signs a contract is bound by its terms, even if he is ignorant of its contents. *Operating Eng'rs Pension Trust* v. *Cecil Backhoe Serv., Inc.*, 795 F.2d 1501, 1505 (9th Cir. 1986); *Operating Eng'rs Pension*

Trust v. *Gilliam,* 737 F.2d 1501, 1504 (9th Cir. 1984). We have held, however, that this general rule "is qualified by the principle that he who signs a document reasonably believing it is something quite different than it is cannot be bound to the terms of the document." *Gilliam,* 737 F.2d at 1504. *See also McNally Pittsburg, Inc.* v. *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers,* 812 F.2d 615, 621 (10th Cir. 1987); 1 *Williston on Contracts* § 95A (3d ed. 1957) ("If without negligence on his part, a signer attaches his signature to a paper assuming it to be a paper of a different character, the paper is void.").

The question of whether a signer's beliefs are reasonable is essentially a question of negligence: on the undisputed facts, was the signer negligent in signing the document without reading it? *United States* v. *McConney,* 728 F.2d 1195, 1204 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). The district court's determination of this issue "is reviewed by the same standard as are findings of fact," *Eichelberger* v. *NLRB,* 765 F.2d 851, 856 (9th Cir. 1985). Therefore, we can overturn the court's findings only if they are clearly erroneous, *McConney,* 728 F.2d at 1204, that is, if "on the entire evidence [we are] left with the definite and firm conviction that a mistake has been committed." *Sutton* v. *Atlantic Richfield Co.,* 646 F.2d 407, 412 (9th Cir. 1981) (citations omitted).

Here, the record supports the district court's finding that Daniel signed the documents obliging him to make pension payments "reasonably believing they were something quite different than what they in fact were." RT at 322. At the meeting with Thomas, Daniel stated his intent to join the union as an owner-operator. RT at 183. Daniel did not read the documents completely before he signed them, *id.* at 240, 259, and did not receive copies of the agreements at the time he signed. *Id.* at 190-92, 260-61.

The district court further noted that the order and manner in which Thomas presented the documents to Daniel supported his claim that he reasonably believed he was only joining the union as an individual. *Id.* at 321. For example Thomas used "X" marks to indicate only the places where Daniel was to sign, *id.* at 183, and filled out parts of the agreements for Daniel, *id.* at 189.

Operating Eng'rs Pension Trust v. *Gilliam,* 737 F.2d 1501 (9th Cir. 1984), presented similar facts. In that case, Gilliam told a union representative that he wanted to join the union as an owner-operator. The union representative "produced a number of standard forms that he said were signed by owner-operators," *id.* at 1504, without explaining that the forms included a short-form agreement and an acknowledgment of trust agreement which obligated Gilliam to make trust fund contributions. The representative filled out the forms for Gilliam, who then signed the documents without reading them. Gilliam was not given copies of the agreements at the time. Relying on this evidence, we affirmed the district court's finding that Gilliam did not know what he was signing. *Id.* at 1505.

Daniel has a somewhat weaker case: Thomas did not deliberately and affirmatively mislead him as to the nature of the documents as the union representative misled Gilliam. However, given the substantial similarity between the evidence supporting the district court's finding in this case and the evidence in *Gilliam,* we cannot hold the district court's finding to be clearly erroneous. Therefore, we affirm the district court's conclusion that Daniel was not bound by the terms of the short form agreement, and thus not obligated to make payments to the Trust.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs-Appellants,
v.
THOMAS G. DANIEL, an individual,
doing business as
CONSOLIDATED CONCRETE PUMPING,
Defendant-Appellee.

Filed: October 21, 1988

Before: Melvin Brunetti, Alex Kozinski and
David R. Thompson, Circuit Judges.

No. 87-6057
D.C. No. CV-85-5064-JGD
ORDER

ORDER

The petition for rehearing is granted. The previous opinion, filed July 1, 1988, is withdrawn, and a memorandum disposition is filed in its stead. The suggestion for rehearing en banc is dismissed as moot.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST, et al.,
Plaintiffs-Appellants,
v.
THOMAS G. DANIEL, an individual,
doing business as
CONSOLIDATED CONCRETE PUMPING,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
April 6, 1988 — Pasadena, California

Filed: July 1, 1988

Before: Melvin Brunetti, Alex Kozinski and
David R. Thompson, Circuit Judges.

Opinion by Judge Kozinski

No. 87-6057
D.C. No. CV-85-5064-JGD
OPINION

SUMMARY

LABOR/PENSIONS

Reversed and remanded. Failure to read terms of collective bargaining agreement did not relieve employer of terms and conditions requiring payment of pension fund contributions.

Appellee Thomas Daniel, owner and principal operator of Consolidated Concrete Pumping, Inc., met with Elbert Thomas, a representative of appellant Operating Engineers Union Local 12, to sign certain papers that Daniel thought were necessary to sign him up as a union member so that he could work for signatory general contractors. In addition to signing up as a union member, the documents also bound his company to the San Diego Master Labor Agreement. The agreement obliged Daniel to make contributions to the pension trust fund based on the number of employees working for Consolidated. Daniel never made any contributions to the union's trust fund. Although an audit discovered the delinquency, Daniel refused to pay. Thereafter the trust filed an action under section 502(e)(1) of the Employee's Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e)(1) as well as under section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a)(1982). The trust sought damages for breach of the subcontracting clause, among other things. The district court found that because Daniel has not been apprised of the nature of the documents that he signed, and had not read them, Consolidated was not bound by the short-form agreement and had no obligation to make pension fund contributions for its employees under the MLA.

[1] Where one party deliberately and affirmatively misleads the other party in a matter going "to the very character of the proposed contract," there has been no meeting of the minds and the contract is void. [2] However, a union has no duty to explain to the employer the terms, conditions, or consequences of a collective bargaining agreement. [3] Accordingly, a party is bound to an agreement he signs regardless of whether or not he has read it.

COUNSEL

Wayne Jett, Jett & Laquer, Pasadena, California, for plaintiffs-appellants.

Mark T. Bennett, Merrill, Schultz & Wolds, Ltd., San Diego, California, for defendant-appellee.

OPINION

KOZINSKI, Circuit Judge:

We consider whether an employer can be relieved of his contractual obligations under a collective bargaining agreement because he knew not what he was doing when he signed on the dotted line.

Facts

Thomas G. Daniel makes his living pumping concrete. He is the owner and principal operator of Consolidated Concrete Pumping, Inc., a small company that hires itself out on a job-to-job basis as a subcontractor to general building contractors. Daniel was working on a construction job site in October 1982 when he was approached by Robert Matthews, a business representative of Operating Engineers Union Local 12, who inquired as to his union membership. Reporter's Transcript (RT) at 173. Daniel told Matthews that he "couldn't sign [his] company as union because he "couldn't afford to pay the rates, the benefits, and the scale that they wanted." *Id.* Matthews advised Daniel that he could not work for signatory general contractors without being a member of Local 12. Daniel and Matthews then discussed the possibility of Daniel's personally joining the union and then working as an employee for general contractors rather than as a subcontractor. RT at 180-82. Daniel then arranged a

meeting with the union on October 19 at which time he would, as he put it, "come in and join." RT at 182. This was the extent of his conversations with Matthews. Neither Matthews nor Daniel mentioned the possibility that Daniel's company would sign a collective bargaining agreement or make contributions to the union's pension trust funds. Finding of Fact (FF) #10, Excerpts of Record (ER) at 28.

On October 19, 1982, Daniel met with Elbert Thomas, a representative of Local 12 who presented to Daniel a set of documents, four of which purported to sign Daniel up as a union member and two of which bound his company under the San Diego Master Labor Agreement (MLA) between Local 12 and the Associated General Contractors of America, San Diego Chapter, Inc. Specifically, Daniel signed each of the following: (1) Local 12 membership application; (2) Local 12 beneficiary designation; (3) Application for membership pledge; (4) Multiple purpose dues assignment form; (5) Short form agreement between Consolidated Concrete Pumping, Inc. and Operating Engineers Union, Local 12; and (6) Acknowledgment and Acceptance of Trust Agreements. By their terms, documents #5 and #6 obliged Daniel to make contributions to the pension trust fund based on the number of employees working for Consolidated Concrete Pumping, Inc.

Following this meeting, Daniel resumed his operations as Consolidated Concrete Pumping; he never made any contributions to the union's trust funds. In 1984, Local 12 conducted an audit of Consolidated Concrete Pumping's books and discovered over $120,000 in delinquent employee contributions. RT at 121-22.

Daniel refused to pay and the trust filed this action under section 502(e)(1) of the Employee's Retirement

Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(1) (1982), and under the terms of the MLA pursuant to section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) (1982). The Trust also sought damages for breach of the subcontracting clause, audit costs, 10% liquidated damages for late payment, and reasonable costs and fees, all totaling $145,886.33. *See* Clerk's Record, Exh. 13.

After trial, the district court found that Daniel signed the short form agreement without reading it, FF #11, ER at 28, and that he "did not think or understand that the signing of the short form agreement bound him under the MLA." FF #13, ER at 29. Further, the court found that Daniel "reasonably and justifiably believed that the various documents signed by him involved only an application for union membership as an owner/operator." FF #12, ER at 29. Accordingly, the court held that Consolidated Concrete Pumping was not bound by the short-form agreement and had no obligation to make pension fund contributions for its employees under the MLA. The court found it unnecessary to consider Daniel's alternate claim that he effectively repudiated the greement under section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) (1982). Conclusion of Law #4, ER at 30. The court also awarded attorney's fees and "special costs" to Daniel pursuant to 29 U.S.C. § 1132(g)(2) (1982). The trust fund appeals.

Discussion

We review the district court's determination that Daniel "reasonably and justifiably believed that the various documents signed by him involved only an application for union membership as an owner/operator." FF #12, ER at 29. While the district court described this as a

"finding of fact," the questions of justifiability and reasonableness in this case require "the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles," and therefore are more properly addressed as questions of law. We therefore review de novo. *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984).

A. By signing the short-form collective bargaining agreement and the acknowledgment and acceptance of Trust Agreements, Daniel agreed to make periodic payments to the trust funds. He paid nothing. Failing to make pension fund contributions is a material breach of the agreement, subjecting the employer to damages. *See, e.g., Operating Eng'rs Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501 (9th Cir. 1986). This would normally be the end of the matter for, as we have said before, "[w]ise or not, a deal is a deal." *United Food & Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385, 1386 (9th Cir. 1986).

[1] We have held, however, that where one party deliberately and affirmatively misleads the other in a matter going "to the very character of the proposed contract," E. Farnsworth, *Contracts* § 4.10, at 235 (1982), there has been no meeting of the minds and the contract is void. *Operating Eng'rs Pension Trust v. Gilliam*, 737 F.2d 1501, 1503-05 (9th Cir. 1984); *Cecil Backhoe*, 795 F.2d at 1504. In *Gilliam* the union representative told the employer that he was only signing up to become a union member personally and that the forms were the ones signed by every owner-operator when he joined the union. *Gilliam*, 737 F.2d at 1503. The union rep filled out the forms himself using information supplied by Gilliam, "who then signed or initialed the documents at places indicated." *Id.*

at 1504. We held that the union rep's statements amounted to fraud in the execution, voiding the contract. *Id.* at 1504-05; *see also Southwest Adm'rs, Inc. vs. Rozay's Transfer*, 791 F.2d 769, 774 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 951 (1987) (describing *Gilliam* as a case involving fraud in the execution).

Perhaps seeking to fit this case into the mold of *Gilliam,* the court below made findings that tracked the language of our opinion in that case, holding that Daniel "reasonably and justifiably believed that the various documents signed by him involved only an application for union membership as an owner/operator." FF #12, ER at 29. But *Gilliam* is not this case. There is no evidence here that the union misrepresented the nature or terms of the documents signed by Daniel on October 19, 1986. The district court thought it germane that "[t]he obligation and consequences of becoming signatory to the short form agreement were not discussed with Daniel by any official or representative of Local 12 prior to or at the time Daniel executed the short-form agreement," FF #10, ER at 28, and that "Daniel did not read the short-form agreement prior to signing it," FF #11, ER at 28, and therefore "did not think or understand that the signing of the short-form agreement bound him under the MLA." FF #13, ER at 29.

[2] We fully accept these findings. But they simply do not suffice to free Daniel from the contract he signed. We have specifically declined to impose on the union "a duty to explain to the employer the terms, conditions, or consequences of a collective bargaining agreement." *Cecil Backhoe,* 795 F.2d, at 1505. *See also* E. Farnsworth, *supra,* § 4.11, at 237-39; Epstein, *Unconscionability: A Critical Reappraisal,* 18 J.L. & Econ. 293, 298-99 (1975) ("a contract cannot be set aside on account of the simple

nondisclosure of facts, which if known might have put the other party off the agreement that was in fact reached"). It is equally well-settled that a party is bound to an agreement he signs regardless of whether or not he has read it. *Gilliam,* 737 F.2d at 1504; *see also Cohen* v. *Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282, 287-88 (9th Cir. 1988); *Cecil Backhoe,* 795 F.2d at 1505.

[3] Our responsibility is to apply the contract as written and to enforce its obligations accordingly. While this may occasionally lead to harsh results, the law, and the parties governed by it, will be far better served if courts rigorously enforce contracts freely made. *See Morta* v. *Korea Ins. Corp.,* 840 F.2d 1452, 1460 (9th Cir. 1988).

B. Daniel also claims that even if he originally was bound to the collective bargaining agreement, he has effectively repudiated it. The parties stipulated that a short form agreement is a pre-hire agreement within the meaning of 29 U.S.C. § 158(f). ER at 3-4. According to longstanding NLRB practice, approved by the Supreme Court in *Jim McNeff, Inc.* v. *Todd,* 461 U.S. 260 (1983), the employer may unilaterally repudiate a pre-hire agreement unless and until an exclusive bargaining representative is selected by a majority of the employees. *Mesa Verde Construction Co.* v. *Northern California Dist. Council of Laborers,* 820 F.2d 1006 (9th Cir.), *reh'g en banc granted,* 832 F.2d 1164 (1987); *R.J. Smith Constr. Co., Inc.,* 191 N.L.R.B. 693 (1971), *enf. denied, sub. nom. Local No 150, Int'l Union of Operating Eng'rs* v. *NLRB,* 480 F.2d 1186 (D.C. Cir. 1973). More recently, however, the NLRB has renounced this rule, deciding that pre-hire agreements cannot be repudiated without a valid representation election under 29 U.S.C. § 159. *John Deklewa & Sons,* 282 N.L.R.B. 184 (Feb. 20, 1987), *enforced sub nom. Interna-*

tional Ass'n of Bridge, Local 3 v. *NLRB,* 843 F.2d 770 (3rd Cir. 1988). Appellee argues that *Deklewa* conflicts with established circuit authority and asks us to apply the old rule which, he argues, would allow him to repudiate the pre-hire agreement. Although this argument was raised below, the district court found it "unnecessary to consider whether that agreement was repudiated." Conclusion of Law #4, ER at 30.

An en banc panel of this court is currently considering the question raised by *Deklewa*: whether employers may unilaterally repudiate pre-hire agreements and whether, if not, the new rule should be applied retroactively. *Mesa Verde,* 832 F.2d at 1164. Because the question of repudiation is, in any event, fact-bound, we believe it prudent to remand the case with instructions that the district court consider the issue in the first instance, guided by the en banc opinion in *Mesa Verde* when it is issued.

REVERSED and **REMANDED** for futher proceedings consistent with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST AND OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs,
v.
THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING,
Defendant.

Filed: May 14, 1987

Case No. 85-5064-JGD (MCx)
Findings of Fact and Conclusions of Law

The above-entitled action came on regularly for trial on April 28 and 29, 1987, before the Court, the Honorable John G. Davies, United States District Judge, sitting without a jury, presiding. Michael A. Urban and Carol Jo Morgan of Jett, Clifford & Laquer appeared for counsel for plaintiffs Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust (collectively "trusts" or "plaintiffs"). Mark T. Bennett of Merrill, Schultz & Wolds, Limited, appeared as counsel for defendant Thomas G. Daniel, an individual doing business as Consolidated Concrete Pumping.

Based upon the admitted oral and documentary evidence, the stipulated facts, the pretrial conference order,

and the oral argument of counsel, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This is an action by the trusts to collect claimed unpaid fringe benefit contributions.

2. The trusts are express trusts created pursuant to written declarations of trust between the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), and various employer associations in the construction industry in southern California and southern Nevada. The trusts were created and now exist pursuant to Labor Management Relations Act § 302(c), 29 U.S.C. § 186(c).

3. At all times material herein, Local 12 has been a labor organization representing employees in the building and construction industry in southern California and southern Nevada. Local 12 is a labor organization representing employees in an industry affecting commerce within the meaning of Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a).

4. At all times material herein, Daniel was an individual doing business as Consolidated Concrete Pumping. Consolidated Concrete Pumping has its principal place of business located in San Diego County, California. At all times material herein, Consolidated Concrete Pumping has been engaged in the building and construction industry and has employed others to operate concrete pumping equipment in the building and construction industry in San Diego County, California.

5. On October 19, 1982, Daniel met with Elbert Thomas, a representative of Local 12. At that time, Daniel signed a document entitled Owner-Operator Short Form

Collective Bargaining Agreement with International Union of Operating Engineers, Local Union No. 12 ("short form agreement"), a copy of which is plaintiffs' Exhibit 1. The short form agreement with Local 12 was a pre-hire agreement within the meaning of National Labor Relations Act § 8(f), 29 U.S.C. § 158(f). The short form agreement incorporated the terms and conditions, with certain exceptions, of the master labor agreement then in effect in the area in which Daniel was working, and in particular the San Diego County Master Construction Labor Agreement between Local 12 and the Associated General Contractors of America, San Diego Chapter, Inc. ("MLA"). The 1980-83 MLA, which is plaintiffs' Exhibit 6, was in full force and effect at the time Daniel signed the short form agreement.

6. Further, on October 19, 1982, Daniel signed written acknowledgments and acceptances of each of the trust agreements. Daniel also signed various Local 12 membership application forms and paid a deposit to Local 12 for membership in the organization.

7. Prior to October 19, 1982, Daniel was unaffiliated with Local 12 and operated his business as a non-union employer. Daniel had been a member of a local of the Teamsters' union approximately twenty-five years prior to October 1982. He had not been a union member for some period of time prior to October 1982, and there is no evidence that he understood the basic operation of the short form agreement.

8. Prior to October 19, 1982, Robert Mathews, a representative of Local 12, discussed with Daniel, in a general fashion, the subject of Daniel's union membership affiliation with Local 12 as an employer and as an owner/operator of concrete pumping equipment.

9. Daniel stated to Mathews that he could not afford to "go union," that is, he could not afford to become signatory to a collective bargaining agreement with Local 12 because he could not afford to pay his employees union wage scales and union benefits. Mathews suggested to Daniel that he become affiliated with Local 12 as an owner/operator.

10. The obligation and consequences of becoming signatory to the short form agreement were not discussed with Daniel by any official or representative of Local 12 prior to or at the time Daniel executed the short form agreement. There is no evidence that Daniel assented to be bound by that agreement except as a member of Local 12 and as an owner/operator of pumping equipment.

11. Daniel did not read the short form agreement prior to signing it. Neither the 1980-83 MLA nor the 1983-85 MLA (which is plaintiffs' Exhibit 7) were provided to him nor discussed with him at any time prior to the execution of the short form agreement by Daniel. The terms and conditions of the MLA were never alluded to or brought to his attention by Local 12 representatives. (The Local 12 representatives, under the law, probably did not have the obligation to bring the terms of the agreement to his attention, but nevertheless, they did not.)

12. Daniel, under the circumstances that existed on October 19, 1982, reasonably and justifiably believed that the various documents signed by him involved only an application for union membership as an owner/operator. The order and manner in which the documents were presented to him by Elbert Thomas and the other union employees present at the time, to wit, the presence of "X" marks on the various documents, including the short form agreement, indicating only the places for Daniel to sign are found to support the inference and the finding that

Daniel thought and believed that he was merely becoming a member of Local 12 as an owner/operator, and that his affiliation with Local 12 did not go beyond that relationship.

13. The court further finds that Daniel did not think or understand that the signing of the short form agreement bound him under the MLA. Daniel believed that it was necessary to execute the short form agreement to permit him to provide services and equipment to union-affiliated construction contractors as an owner/operator.

14. Any finding of fact which is also a conclusion of law shall be deemed to be a finding of fact and a conclusion of law also.

15. The attached transcript is incorporated herein, and to the extent articulated findings of the court are not set forth herein, said findings are hereby made by the court.

CONCLUSIONS OF LAW

1. Any conclusion of law which is a finding of fact shall be deemed to be a conclusion of law and a finding of fact also.

2. This court has jurisdiction over this action under Section 301(a) and Employee Retirement Income Security Act of 1974 § 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. The court finds that Daniel signed the short form agreement and the acknowledgment and acceptances of the trust agreements reasonably believing they were something quite different than what they were in fact. Daniel believed they were documents that affiliated him with Local 12 as an owner/operator member and gave him the right to provide services and equipment as an

owner/operator to contractors who were signatory to a Local 12 collective bargaining agreement. There was no mutual assent to Daniel becoming bound to a collective bargaining agreement with Local 12; the short form agreement did not create an enforceable collective bargaining agreement with Local 12. The trusts' complaint must be dismissed with prejudice.

4. As the court finds that Daniel was not bound to the short form agreement, it is unnecessary to consider whether that agreement was repudiated pursuant to Sectio 8(f) or any other defense raised to the trusts' claims.

5. The court will consider a separate application by Daniel for an award of attorneys' fees and costs under Employee Retirement Income Security Act of 1974 § 502(g)(1), 29 U.S.C. § 1132(g)(1), as amended, and will rule on that application separately.

LET JUDGMENT BE ORDERED ACCORDINGLY.

Dated: May 14, 1987

JOHN G. DAVIES
United States District Judge

Approved as to form by:

MERRILL, SCHULTZ & WOLDS, LIMITED

By MARK T. BENNETT
Counsel for Defendant

JETT, CLIFFORD & LAQUER

By MICHAEL A. URBAN
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

The Honorable John G. Davies, Judge Presiding

OPERATING ENGINEERS PENSION TRUST FUND,
Plaintiffs,

v.

THOMAS G. DANIEL,
Defendant.

Reporter's Partial Transcript of Proceedings
Los Angeles, California
Wednesday, April 29, 1987

No. CV 85-5064-JGD

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Official Court Reporter
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LOS ANGELES, CALIFORNIA;
WEDNESDAY, APRIL 29, 1987
4:00 P.M. SESSION

(Other proceedings had but not transcribed pursuant to request of counsel.)

The Court: Counsel.

Mr. Urban: Your Honor, I know the court has reached its findings, and I was wondering if it would be possible for me to bring one additional item concerning —

The Court: Certainly.

Mr. Urban: Item to the court's attention.

I just wanted to point out that the membership documents signed by Mr. Daniel with Local 12 were all signed and filled out with the name Thomas G. Daniel, but that the short form agreement and the trust agreements, acknowledgements that are the basis of this lawsuit, were not filled out in the name Thomas G. Daniel but in the name of the company, Consolidated Concrete Pumping, not the individual name.

I neglected to mention that during argument. Thank you, Your Honor.

The Court: What, in your mind, is the significance of that fact?

(Pause.)

The Court: What is the significance of that fact?

Mr. Urban: Just that if Mr. Daniel was believing that the only purpose of his being there was to sign up as an individual for membership, why would he sign documents on behalf of the company, fill them out on behalf of

Consolidated Concrete Pumping and not in his individual capacity.

The Court: What is the status of the Gilliam case?

Mr. Urban: It's a final decision in which Mr. Gilliam signed that agreement as Bill W. Gilliam.

The Court: The Court's findings are as follows firstly, the Court has jurisdiction based on Section 301(a) of the Labor Management Relations Act of 1947 as amended which is 29 U.S.C. Section 185(a) and upon Section 502 of the Employee Retirement Income Security Act of 1974 as amended which is 29 U.S.C. Section 1132.

The Court finds that the trusts are express trusts created pursuant to written Declarations of Trust between the International Union of Operating Engineers Local Union Number 12 and various employer associations in the construction industry in southern California and southern Nevada.

The Trusts were created and now exist pursuant to Section 302(c) of 29 U.S.C. Section 186(c).

Further, at all times material herein, Local 12 has been a labor organization representing employees in the building and construction industry in southern California and southern Nevada and a labor organization representing employees in an industry affecting commerce pursuant to Section 301(a) of the LMRA, Title 29 U.S.C. Section 185(a).

Further, the defendant Thomas G. Daniel at all times relevant herein was an individual doing business as Consolidated Concrete Pumping with its principal place of business located in San Diego County. At all times material herein Consolidated Concrete Pumping has been engaged in the building and construction industry.

The Court further finds that on October 19, 1982 Thomas G. Daniel, who I will refer to simply as "Daniel" from here on out, signed a written short form agreement with Local 12 which was a pre-hire agreement under Section 8, subsection (f) of the National Labor Relations Act.

Further, on October 19, 1982 Daniel signed written acknowledgements and acceptances of each of the trust agreements.

Also, on October 19, 1982 Daniel signed various Local 12 membership application forms and paid a deposit to Local 12 for memberhsip in that organization.

Further, the pre-hire agreement incorporated the terms and conditions, with certain exceptions, of the master labor agreement which was in effect in the area where he was working at the time, and in particular the San Diego County Master Construction Labor Agreement, an agreement between Local 12 and the Associated General Contractors of America, the San Diego Chapter, Inc., was in full force and effect at the time.

At all times relevant to this action the defendant employed others to operate pumping equipment in the construction trade in San Diego County. On October 19, 1982, and prior thereto, the defendant was the owner of concrete pumping equipment, and he not only was the owner but also operated the equipment on various job sites in San Diego County.

During 1982 and prior to October 19, 1982, the defendant experienced a period of economic downturn in his business. During that time he provided services and equipment to building contractors who were signatories to a Local 12 collective bargaining agreement.

Prior to October 19, 1982 the defendant was unaffiliated with Local 12 and operated his business as a non-union employer.

Prior to October 19, 1982 Robert Mathews, a representative of Local 12, discussed with Daniel, in a general fashion, the subject of Daniel's union membership affiliation with Local 12, as an employer, and as an owner/operator of concrete pumping equipment.

Daniel stated to Mathews that he could not afford to, quote, "go union," end quote. That is, that he could not afford to become a signatory to a collective bargaining agreement because he could not afford to pay employees union wage scales and union benefits.

Mathews suggested to Daniel that Daniel become affiliated with Local 12 as an owner/operator.

Next, the obligations and consequences of becoming a signatory to the pre-hire agreement were not discussed with Daniel by any official or representative of Local 12 prior to or at the time of executing plaintiffs' Exhibit 1 in evidence which is the pre-hire owner/operator's agreement.

There is no evidence that Daniel assented to be bound by that agreement except as a member of Local 12 and as an owner/operator of pumping equipment.

The Court finds that Daniel did not read the agreement. Neither master agreement, which is Exhibit 6 and Exhibit 7, in slightly different forms, were provided to him nor discussed with him at any time prior to the execution of the pre-hire agreement by him.

The terms and conditions of said master agreement were never alluded to, nor brought to his attention, by the union representatives.

Parenthetically, the union representatives, under the law, probably did not have the obligation to bring the terms of the collective bargaining agreement to his attention, but nevertheless, they did not.

Further, Daniel, under the circumstances that existed on October 19, 1982 reasonably and justifiably believed the various documents signed by him involved only an application for union membership as an owner/operator.

The order and manner in which the documents were presented to him by Elbert Thomas and the other union employees present at the time, to wit, the presence of "X" marks on the various documents indicating only the places for Mr. Daniel to sign — including plaintiffs' Exhibit 1 next to the signature line — those facts are found by the court to support the inference and the finding that Mr. Daniel thought and believed that he was merely signing up as a member and owner/operator, and his affiliation with Local 12 did not go behond that relationship.

The Court further finds that Daniel did not think or understand that the signing of the pre-hire agreement bound him under the Local's collective bargaining agreement. He believed it was necessary to execute the pre-hire agreement to permit him to provide services and equipment to union-affiliated construction contractors.

The Court further finds that Daniel had been a member of a Teamsters local approximately 25 years prior to October 1982. He had not been a union member for some period of time prior to October 1982, and there is no evidence that he understood the basic operation of the short form pre- hire agreement.

Daniel signed the pre-hire agreement and acknowledgement and acceptances of the trust agreements reasonably

believing they were something quite different than what they in fact were.

The Court finds that Daniel believed they were documents that affiliated him with Local 12 as an owner/operator member and gave him the right to provide services and equipment as an owner/operator to contractors who were signatories to a Local 12 collective bargaining agreement.

The Court finds there was no mutual assent.

Since I have found no mutual assent and find that Daniel is not bound by the pre-hire agreement, I do not feel it necessary to consider the so-called repudiation defense.

There is one other area that needs briefing. This Court has jurisdiction under 20 U.S.C. section 1132, The Employees Retirement Income Security Act of 1947, and section 1132(g)(1) vests this Court with discretion to award attorney's fees to successful defendants such as Mr. Daniel.

I want this briefed. It has not been briefed. It should have been briefed. No guidance has been given to the Court on this issue.

Will you please brief it, Mr. Bennett.

I will consider an award of attorney's fees in Mr. Daniel's favor if it is supported by the law, and thus you should brief that, and also in the same paper set forth the nature and extent of your services and whatever reasonable fee, hourly rate or other fee arrangement you think would be appropriate.

Mr. Bennett: When would you like to have that brief filed?

The Court: Forthwith.

Therefore the Court finds for the defendant and against each of the plaintiffs.

I would ask the defendant to please order immediately a copy of the transcript of my findings as I have just articulated them and prepare findings. I do not want you to embellish, expand or substantially alter the findings as they have just been articulated.

Mr. Bennett: Yes, your honor.

The Court: I want you to attach a copy of the transcript to your proposed findings, and I want it done forthwith so judgment can be entered in favor of you client.

Is there anything else?

Mr. Urban: Yes, your honor.

Will the plaintiffs have the opportunity to respond to the briefing by Mr. Bennett?

The Court: What briefing?

Mr. Urban: Concerning the attorney's fees issue.

The Court: Of course. That is an open question. I haven't had time to research it fully, and there are certain things that must be demonstrated by the defendant to support an award of attorney's fees against the trusts, and I would like guidance.

Anything else?

Mr. Bennett: Your honor, on the findings, should send them to counsel for approval?

The Court: No. Well —

Mr. Bennett: Approval as to form only.

The Court: I am going to sign them. I think the courteous thing is to send them to counsel for approval, but I don't want this to be the beginning of a debate on findings. I know what lawyers do when it comes to the creation of findings.

It is your responsibility, counsel, to prepare the findings. I don't want to spend a great amount of time trying to sort out your version of the findings and compare them to Mr. Urban's version of the findings. The findings have been articulated and I think they are sufficient.

Mr. Bennett: I intend mostly to quote.

The Court: Anything else?

Mr. Urban: With regard to the briefing on that issue, you mentioned forthwith for the briefing by the defendant. Is there any indication of how much time there would be to respond to that by the plaintiffs?

The Court: Five days.

Mr. Urban: Thank your, your honor.

The Court: I don't think you will have any trouble because you obviously know the law quite well and that should not constitute any problem for you.

Mr. Urban: No, your honor.

The Court: Anything else?

Mr. Bennett: "Forthwith" being?

The Court: Immediately. Immediately.

You just won the case, now go home and prepare the papers and wrap it up.

Mr. Bennett: I understand.

The Court: Thank you.

(Proceedings adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

April 30, 1987

RUANNE MCARTHUR
Official Court
Reporter

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST AND OPERATING ENGINEERS TRAINING TRUST,
Plaintiffs,
v.
THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING,
Defendant.

Filed: June 17, 1987

Case No. 85-5064-JGD (MCx)
Judgment Awarding Costs and Attorneys' Fees

The application of defendant Thomas G. Daniel for attorneys' fees, having been duly considered and a decision having been rendered.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that defendant Thomas G. Daniel is granted judgment against plaintiffs Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust jointly and severally for defendant's attorneys' fees in the sum of $31,170.25, and for costs in addition to those otherwise recoverable against plaintiffs in the sum of $3,302.26.

DATED: June 17, 1987

JOHN G. DAVIES

John G. Davies
United States District Judge

Presented By:

MERRILL, SCHULTZ & WOLDS, LIMITED

MARK T. BENNETT

Mark T. Bennett
Attorneys for Defendant

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On May 18, 1989, I served the within Petition for Writ of Certiorari, in re: "Operating Engineers Pension Trust vs. Thomas G. Daniel" in the United States Supreme Court, October Term 1988, No. ....., on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Mark T. Bennett, Esq.
Merrill, Schult & Wolds, Ltd.
1855 First Avenue, Suite 100
San Diego, California 92101

All parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 18, 1989, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
JUN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1892

In The

Supreme Court of the United States

October Term

OPERATING ENGINEERS PENSION TRUST, *et al.*,

Petitioners,

vs.

THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 88-1892

In The

Supreme Court of the United States

October Term

OPERATING ENGINEERS PENSION TRUST, *et al.*,

Petitioners,

vs.

THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Thomas G. Daniel ("Daniel"), an individual doing business as Consolidated Concrete Pumping, respectfully requests that the petition for a writ of certiorari filed by petitioners Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and

Operating Engineers Training Trust ("Trusts") be denied.[1] Daniel is satisfied with the Trusts' list of the parties, the grounds for jurisdiction in this Court, and the Trusts' quotation of the pertinent statutory provisions. (Petition at ii, 2-4) Pursuant to Sup.Ct.R. 34.2, a further statement on these topics is omitted.

The Trusts did not include a reference to or a copy of the district court's order awarding Daniel costs and attorneys' fees under Employee Retirement Income Security Act of 1974 ("ERISA") § 502(g)(1), 29 U.S.C. § 1132(g)(1). A copy of that order is included as an appendix to this opposition. Daniel is otherwise satisfied with the Trusts' citation to the opinions and judgments in the district court and the court of appeals.

STATEMENT OF THE CASE

The Trusts sued Daniel in the United States District Court for the Central District of California pursuant to Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185 ("Section 301"), and ERISA § 502, 29 U.S.C.

[1] "Petition" refers to the Trusts' petition for a writ of certiorari. "App. Cert." refers to portions of the appendices to the Trusts' petition. "App. A" refers to excerpts from the pretrial conference order filed in the district court which is attached as Appendix A. "App. B" refers to the district court's order awarding Daniel costs and attorneys' fees under ERISA § 502(g)(1) which is attached as Appendix B. "App. C" refers to excerpts from the Trusts' opening brief in the court of appeals which is attached hereto as Appendix C.

§ 1132. The Trusts sought to recover fringe benefit contributions, liquidated damages, interest, and attorneys' fees in excess of $130,000. The Trusts' claim is premised upon an agreement, consisting of three pages, Daniel signed with International Union of Operating Engineers, Local 12 ("Local 12") on October 19, 1982. This agreement does not by its own terms require the payment of contributions to the Trusts. The massive monetary obligations asserted by the Trusts is derived from incorporated documents known as the San Diego County Master Labor Agreements ("MLA"), each of which is over 120 pages in length.

Daniel testified that he signed the agreement without reading it. He believed that the agreement and the other documents he signed on October 19 involved only an application for membership in Local 12. (App. Cert. at D-4) After hearing the testimony of the witnesses in a bench trial, United States District Judge John G. Davies believed Daniel. Judge Davies concluded that Daniel was not bound to the terms of the agreement based upon the following factual findings:

1. Daniel's prior nonaffiliation with Local 12 either as a member or as a union signatory employer;

2. The lack of any evidence that Daniel understood the basic operation of the agreement he signed;

3. Daniel's statements to Local 12 representative Robert Mathews prior to October 19 that he could not afford to become signatory to a contract with Local 12;

4. Daniel's understanding, based upon his discussions with Mathews, that the meeting on October 19 was for the sole purpose of having Daniel become a member of Local 12 so he could provide services and equipment to Local 12 signatory construction contractors as an owner-operator;

5. The fact that the agreement was presented to Daniel as the last document to be signed in a series of six different forms, the first four of which are completed only by applicants for membership in Local 12;

6. The presence of "X" marks made by Local 12 representative Elbert Thomas on the various documents signed by Daniel, including the agreement, indicating only the places for Daniel's signature; and

7. The fact that a copy of the incorporated MLA was not provided to Daniel at any time prior to the execution of the agreement and the fact that the terms and conditions of the agreement were never alluded to or brought to Daniel's attention.

(App. Cert. at D-2 – D-5) Judge Davies also found that the Trusts' suit against Daniel smacked of bad faith because of the close factual similarity between Daniel's case and prior litigation involving these same Trusts in *Operating Eng'rs Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). (App. B at B-2)

The Trusts appealed Judge Davies' decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit accepted Judge Davies' factual findings.

The Ninth Circuit agreed that the accepted facts rendered Daniel's belief that the agreement involved only an application for union membership reasonable and justifiable. (App. Cert. at A-2 – A-5)

Judge Davies also awarded Daniel attorneys' fees in the amount of $31,170.25 and costs in the amount of $3,302.26 under ERISA § 502(g)(1) and Fed.R.Civ.P. 54. (App. Cert. at E-1) In exercising his discretion under ERISA § 502(g)(1), Judge Davies applied the standards set forth in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). Judge Davies found that an award of attorneys' fees and costs was appropriate because: (1) the prosecution of the Trusts' action smacked of bad faith in light of the Ninth Circuit's prior *Gilliam* decision, (2) the Trusts possess the ability to satisfy an award of costs and fees against them, (3) such an award will deter others from acting under similar circumstances, and (4) the merits of Daniel's position was such that the Trusts should not, in good conscience, knowing all the facts, have burdened Daniel with the need to defend the action. (App. B at B-3) The Ninth Circuit affirmed the award of costs and attorneys' fees.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. None of the Questions Presented were Raised by the Trust Funds in the District Court or Before the Ninth Circuit in the Trusts' Opening Brief.

This Court does not consider issues which are neither raised before nor considered by the court of appeals.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); *Ramsey v. UMW*, 401 U.S. 302, 312 (1971). None of the questions presented for review were raised before either the district court or the Ninth Circuit in the opening brief.[2] Consequently, neither the district court nor the Ninth Circuit addressed any of the questions raised in the petition.

Before the district court and the Ninth Circuit, the Trusts admitted subject matter jurisdiction under ERISA § 502 and Section 301 as to all issues asserted by the parties. Those admissions are contained in the pre-trial conference order (App. A at A-2) and in the Trusts' opening brief (App. C at C-5).

The Trusts did not raise any issue regarding whether the National Labor Relations Board ("NLRB") has exclusive jurisdiction over the existence or validity of a collective bargaining agreement. (*See* App. A at A-3 – A-5; App. C at C-2 – C-3) The Trusts did not argue to the district court that federal courts are precluded by LMRA § 302, 29 U.S.C. § 186, and ERISA § 515, 29 U.S.C. § 1145, from considering a defense going to the existence of the underlying agreement in an action to collect fringe benefit contributions. (*See* App. A at A-3 – A-5) The Trusts' only argument to the Ninth Circuit on whether Daniel was bound to the agreement was that Daniel had not shown that Local 12 committed fraud in the execution of the agreement. (App. C at C-2 – C-3)

---

[2] The Ninth Circuit will only consider those arguments raised in the opening brief. *Bricklayers, Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

On the question of the award of attorneys' fees, the Trusts' only argument to the Ninth Circuit was that the district court abused its discretion. (*Id.*, at C-4) They did not quarrel with the authority of the district court to award attorneys' fees under ERISA § 502(g)(1).

B. The Clear Trend in the Courts of Appeals' Decisions is that Section 301 Does Give Federal Courts Subject Matter Jurisdiction Over the Existence and Validity of a Collective Bargaining Agreement.

As conceded by the Trusts, the Third, Fifth, Tenth, and Eleventh Circuits have held that Section 301 gives the federal courts subject matter jurisdiction over whether a valid collective bargaining agreement exists. (Petition at 11) The recent opinions leave no doubt but that the Ninth Circuit is in agreement with these federal courts of appeals. *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1326 (9th Cir. 1988), *cert. denied*, 109 U.S. 1768 (1989); *IBEW, Local 532 v. Brink Constr. Co.*, 825 F.2d 207, 212 (9th Cir. 1987).

Inexcusably, the Trusts misrepresent that the Seventh Circuit disagrees with the Third, Fifth, Ninth, Tenth and Eleventh Circuits, citing *NDK Corp. v. Local 1550, United Food and Commercial Workers Int'l Union*, 709 F.2d 491 (7th Cir. 1983). (Petition at 11) *NDK Corp.* was expressly overruled more than five months ago. In *IBEW, Local 41 v. Sign-Craft Inc.*, 864 F.2d 499 (7th Cir. 1988), the Seventh Circuit reviewed the decisions of the other federal courts of appeals and the decisions of this Court regarding the

scope of subject matter jurisdiction under Section 301. The Seventh Circuit overruled *NDK Corp.* as having interpreted Section 301 too narrowly and held that "under Section 301(a), any disputes about the meaning or validity of collective bargaining agreements come within the jurisdiction of the federal courts." 864 F.2d at 502; *see also Mack Trucks, Inc. v. UAW*, 856 F.2d 579, 585-90 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1316 (1989) (where the Third Circuit canvassed over thirty years of this Court's precedents and reached the same conclusion).

Only two cases support the Trusts' position. Those are *Hernandez v. National Packing Co.*, 455 F.2d 1252 (1st Cir 1972), and *A.T. Massey Coal Co. v. UMW*, 799 F.2d 142 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1964 (1987). *Hernandez* is over fifteen years old and has not been followed by any other federal court of appeals. *A.T. Massey Coal Co.*, while of a more recent vintage, suffers from the same infirmity. *A.T. Massey Coal Co.* has received sharp criticism for failing to articulate a legal basis for its holding that subject matter jurisdiction exists when a union files suit to obtain a ruling that an employer is bound to a collective bargaining agreement, but finding no subject matter jurisdiction in a case filed by the employer on identical facts alleging that the contract did not exist. *Mack Trucks, Inc.*, 856 F.2d at 589 n.10.

In light of the number of federal appellate courts which have found subject matter jurisdiction under Section 301 to determine the validity and existence of collective bargaining agreements, the *Hernandez* and *A.T. Massey Coal Co.* cases must be viewed as aberrational.

This is not the appropriate case to correct the decisions of the First and Fourth Circuits. The Trusts conceded subject matter jurisdiction in the lower courts. The Ninth Circuit did not discuss the nature of Section 301 jurisdiction. The exercise of jurisdiction over Daniel's defense is consistent with the decisions of a majority of the federal appellate courts which have confronted the issue.

C. There is no Conflict Among the Courts of Appeals Over Whether the NLRB has Exclusive Jurisdiction Over The Existence of a Collective Bargaining Agreement

The Trusts maintain that whether a binding agreement was formed between Daniel and Local 12 is within the exclusive jurisdiction of the NLRB. (Petition at 10, 16) The Trusts do not cite to the decision of a single federal appellate court which has accepted this novel theory. The Third, Seventh, and Ninth Circuits have ruled that the federal courts can resolve disputes over the existence of a collective bargaining agreement without treading upon the jurisdiction of the NLRB. *Sign-Craft, Inc.*, 864 F.2d at 503; *Mack Trucks, Inc.*, 856 F.2d at 591-92; *Brink Const. Co.*, 825 F.2d at 212. Given this agreement among the federal courts of appeals, there is no need for this Court to resolve the sham preemption issue first raised by the Trusts in its petition.

D. There is no Conflict Among the Circuits Regarding Whether the Existence of a Collective Bargaining Agreement is a Defense to an Action for Contributions.

The Trusts suggest that there is a conflict between the Ninth Circuit's decision in this case and the decisions in *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989), and *Bituminous Coal Operators' Ass'n, Inc. v. Connors*, 867 F.2d 625 (D.C. Cir. 1989). The Trusts maintain that these cases, which interpret ERISA § 515, "bar any defense against the enforcement of the written agreement for employee benefit contributions, specifically including any defense directed to the formation or existence of the contract." (Petition at 17) The Trusts' reading of these decisions is incorrect.

In neither *Gerber Truck Service, Inc.* nor *Connors* did the employer assert it did not intend to contract with the union or that it was misled about the nature of the documents signed. Each employer understood it was signing a contract which required the payment of trust fund contributions. In *Connors*, 867 F.2d at 627, the employer argued that bargaining history showed it was not required to pay pension contributions after the pension fund became fully funded. In *Gerber Truck Service, Inc.*, 870 F.2d at 1149-51, the employer claimed that it was not required to make contributions on behalf of non-union employees based upon a side agreement reached with a union official.

The courts in both cases relied upon the Ninth Circuit's decision in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). *Gerber Truck Service, Inc.*, 870 F.2d at 1149;

Connors, 867 F.2d at 634. In *Rozay's Transfer*, the Ninth Circuit acknowledged that an employer can defeat a trust fund collection action by proving that it signed an agreement while reasonably believing that the document was something entirely different than what it was in fact. But an employer cannot avoid the payment of trust fund contributions based upon an oral modification of the terms of a written contract made with a union agent. 791 F.2d at 773-74.

In this case, both the district court and the Ninth Circuit found that Daniel signed the agreement with Local 12 while reasonably and justifiably believing that he was merely applying for union membership. Neither *Gerber Truck Service, Inc.* nor *Connors* raises this question, as the employers in those cases relied only upon oral modifications to the terms of written contracts as a defense to the claims for contributions. There is no direct and irreconcilable conflict with those decisions.

E. The Trusts Have Shown no Basis for Reviewing the Award of Attorneys' Fees Under ERISA § 502(g)(1).

The Trusts have pointed to no conflict among the federal courts of appeals on the question of whether a prevailing employer such as Daniel can recover attorneys' fees under ERISA § 502(g)(1). The Trusts rely solely upon some mythical congressional history which they did not favor with a citation to the appropriate legislative materials. (Petition at 18)

In *Carpenters Southern Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984), the Ninth Circuit reviewed

the legislative history of ERISA § 502(g)(1). The court concluded that nothing in the legislative history supported a departure from the clear statutory language which gives discretion to the district court to award attorneys' fees to the prevailing party in actions by trust funds to recover contributions. Given ERISA § 502(g)(1)'s unambiguous language, there is no need to consult its legislative history. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 n.29 (1978); *Ex parte Collett*, 337 U.S. 55, 61 (1949).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MERRILL, SCHULTZ & WOLDS, LIMITED

Dated: June 13, 1989

MARK T. BENNETT, Attorneys
for Thomas G. Daniel,
an individual
doing business as
Consolidated Concrete
Pumping

APPENDIX A

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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, et al., Plaintiffs, vs. THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING, Defendant.	CASE NO. CV 85-5064 JGD (Mcx) PRETRIAL CONFERENCE ORDER (Filed December 15, 1986) Date: December 15, 1986 Time: 1:30 p.m.

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

I

This is an action for money for breach of a written agreement covering the period October 19, 1982, to June 15, 1985. The plaintiffs are the Operating Engineers Pension Trust, Operating Engineers Health and Welfare

Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (hereinafter "Trusts"). The defendant is Thomas G. Daniel, an individual doing business as Consolidated Concrete Pumping (hereinafter "Consolidated"). Each of these parties has been served and has appeared. There are no other parties named in the pleadings.

The pleadings which raise the issues are the Complaint and the First Amended Answer to Complaint.

II

Federal Jurisdiction and venue are invoked upon the grounds that the action is brought upon the breach of an alleged written collective bargaining agreement between Consolidated, an employer primarily engaged in the building and construction industry, and the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"), a labor organization representing employees in an industry affecting interstate commerce. Jurisdiction is based on Section 301(a) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 185(a)] (hereinafter "LMRA"), and Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1132(e)(1)] (hereinafter "ERISA"). Federal jurisdiction for the period October 19, 1982, to June 15, 1985, is admitted. Venue is conceded as all parties have generally appeared herein.

* * *

VII

The following issues of fact, and no others, remain to be litigated at trial:

1. Did Daniel understand on October 19, 1982, that he was signing an agreement with Local 12 on behalf of Consolidated.

* * *

6. Does Consolidated owe the Trusts any money as and for fringe benefit contributions on its employees, and if so, in what amount?

* * *

12. Pursuant to Section 29 U.S.C. § 1132(g)(1), do the Trusts owe Consolidated any money as and for attorney's fees, and if so, in what amount?

VIII

The following issues of law, and no others, remain to be litigated at the trial:

1. Was Consolidated bound to the terms of the Agreement signed by Daniel on October 19, 1982, and the terms of the Master Labor Agreement and Trust Agreements incorporated therein?

a. If so, could Daniel repudiate Consolidated's Agreement prior to June 15, 1985, pursuant to Section 8(f) by conduct? If so, was the Agreement so repudiated, and on what date?

b. If so, could Daniel repudiate Consolidated's Agreement prior to June 15, 1985, pursuant to Section 8(f) by submitting its notice of intent to terminate dated

March 7, 1985. If so, was the Agreement so repudiated and on what date?

2. Are the Trusts entitled to any money from Consolidated as and for fringe benefit contributions for hours worked by or paid to Consolidated's employees? If so, what amount is due and owing?

3. Are the Trusts entitled to any money as and for damages from Consolidated for non-union subcontracting violations? If so, what amount is due and owing?

4. Are the Trusts' claims for work performed by persons not employed by Consolidated and by Daniel's children barred by illegality? [Plaintiffs do not contend that this is an issue].

5. Are the Trusts entitled to any money from Consolidated as and for liquidated damages for breach of the Master Labor Agreement or 29 U.S.C. § 1132(g)(2)(C)? If so, what amount is due and owing?

6. Pursuant to the Master Labor Agreement or 29 U.S.C. § 1132(g)(2)(D), are the Trusts entitled to any money from Consolidated as and for auditing costs and attorney's fees incurred by the Trusts? If so, what amounts are due and owing?

7. Pursuant to 29 U.S.C. § 1132(g)(2)(B), are the Trusts entitled to any money from Consolidated as and for prejudgment interest? If so, what amount is due and owing?

8. Is Consolidated entitled to attorney fees from the Trusts, and if so, what amount is due and owing?

* * *

XV

The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Pretrial Conference Order shall supersede the pleadings and govern the course of trial of this case, unless modified to prevent manifest injustice.

DATED: December 15, 1986

/s/ John G. Davies
UNITED STATES
DISTRICT JUDGE

Approved as to form and Content:

JETT, CLIFFORD & LAQUER

Michael A. Urban
Carol Jo Morgan

By Carol Jo Morgan
Carol Jo Morgan
Counsel for Plaintiffs

MERRILL, SCHULTZ & WOLDS, LIMITED

By Mark T. Bennett
Mark T. Bennett
Counsel for Defendant

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST and OPERATING ENGINEERS TRAINING TRUST,	CASE NO. CV 85-5064 JGD
Plaintiffs,	ORDER RE AWARD OF COSTS AND ATTORNEY'S FEES
v.	(Filed May 22, 1987)
THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING.	
Defendant.	

Following the court trial of the action herein, defendant Thomas G. Daniel, on May 7, 1987, filed his Application for Costs and Attorney's Fees pursuant to 29 U.S.C. § 1132(g)(1) and Federal Rules of Civil Procedure, Rule 54.

The Court having considered the evidence at trial, the application of the defendant, the memoranda of points and authorities, declarations and argument of counsel, for the reasons set forth herein below, rules as follows:

The plaintiffs are fiduciaries as contemplated by 29 U.S.C. § 1132(g)(1). Under said statute the Court has discretion to allow reasonable attorney's fees and costs and to award same to the prevailing defendant.

An award of attorney's fees and costs is particularly appropriate in this case because the facts herein closely parallel the facts in *Operating Eng. Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). The Court is persuaded to exercise its discretion and award attorney's fees and costs to the defendant not only by the mandate of *Gilliam*, but also by the fact that the plaintiffs in *Gilliam* are the plaintiffs in this action and, as in *Gilliam*, are represented by the same counsel, Jett, Clifford & Laquer.

In determining reasonable attorney's fees and costs, the Court has considered the following factors and based its determination thereon: (1) the novelty and complexity of the issues presented; (2) the time devoted to the case by counsel for the defendant; (3) his ability and experience; (4) customary attorneys fees charged in this district; and (5) awards in similar cases. (*Kerr v. Screen Extra Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975)).

The Court, in considering the award of attorney's fees and costs in defendant's favor, and against plaintiffs, is cognizant of the factors set forth in *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). The Court finds that the amount of attorney's fees and costs claimed is reasonable. The Court exercises its discretion to make this award because, (1) the prosecution of this action in light of *Gilliam* smacks of bad faith on the part of the plaintiffs, (2) the plaintiffs possess the ability to satisfy an award of fees and costs against them, (3) such an award would

tend to deter others from acting under similar circumstances, and (4) the merits of the defendant's position were such that the plaintiffs should not, in good conscience, knowing all the facts, have burdened defendant with the need to defend this action.

The defendant is awarded attorney's fees in the sum of $31,170.25, and costs, in addition to those otherwise recoverable against plaintiffs, in the sum of $3,302.26.

Dated this 22nd day of May 1987.

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX C

No. 87-6057

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST and OPERATING ENGINEERS TRAINING TRUST,

Plaintiffs-Appellants,

vs.

THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING.

Defendant-Appellee.

On Appeal From the United States District Court for the Central District of California

---

OPENING BRIEF OF APPELLANTS

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OPENING BRIEF OF APPELLANTS

STATEMENT OF THE ISSUES

1. Did the district court err in concluding that no contractual obligation resulted from the signing of the collective bargaining agreement by Daniel and Local 12?

2. Did the district court err in failing to rule that "repudiation" is not a defense to enforcement of the collective bargaining agreement?

3. Did the district court err in failing to award the Trusts' delinquent contributions, prejudgment interest, liquidated damages, audit costs and attorney's fees incurred as provided by 29 U.S.C. § 1132(g)(2)?

4. Did the district court err in awarding attorney's fees and "special costs" to Daniel?

* * *

a. *Subject Matter Jurisdiction In The District Court.*

Subject matter jurisdiction in the district court under 29 U.S.C. §§ 185 and 1132 is uncontested. The district court ruled that such jurisdiction exists. CR: 61, p. 6. This action is to enforce payment of employee benefit contributions under an agreement between an employer and a labor organization. *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 760 (9th Cir. 1981).

* * *

(3)

Supreme Court, U.S.
FILED
JUN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1892

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

OPERATING ENGINEERS PENSION TRUST, *et al.*,
Petitioners,

vs.

THOMAS G. DANIEL, an individual doing business as
CONSOLIDATED CONCRETE PUMPING,
Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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2 pp

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Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Operating Engineers Pension Trust, *et al.* ("Trusts"), respectfully reply to the Opposition filed on behalf of respondent Thomas G. Daniel ("Daniel") as follows:

THE ISSUES PRESENTED IN THE PETITION WERE RAISED AT THE EARLIEST TIME PERMITTED BY NINTH CIRCUIT LAW.

A. Each Issue Presented In The Petition Was Settled Law In The Ninth Circuit When This Action Was Litigated In The District Court.

Daniel opposes granting the petition on grounds that the questions presented were not raised in the district court or in the Trusts' opening brief to the Ninth Circuit. However, Daniel fails to note that these issues could not have been presented to the district court or to the three judge panel of the Ninth Circuit because each issue involved settled law of the Ninth Circuit at the time.

The pretrial conference order establishing issues for trial was filed December 15, 1986. (Opposition, p. A-1.) By that time, the Ninth Circuit had already settled its view that LMRA § 301 grants jurisdiction to determine the existence of a collective bargaining agreement in *Griffith Construction Co. v. Carpenters,* 785 F.2d 706, 712 (9th Cir. 1986) filed March 20, 1986. *See Electrical Workers v. Brink Construction Co.,* 825 F.2d 207, 212 (9th Cir. 1987) filed August 17, 1987, citing *Griffith* as binding precedent for the rule that LMRA § 301 grants courts jurisdiction to determine the issue of the contract's *existence* and *validity,* as well as to resolve *breach* of contract disputes. The Ninth Circuit's view that "general principles of contract law apply to the formation of collective bargaining agreements" was settled not later than August 7, 1986, in *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.,* 795 F.2d 1501, 1504 (9th Cir. 1986).

Likewise, the Ninth Circuit's view that ERISA § 515 permits a defense going to the existence or validity of the agreement requiring employee benefit contributions was

settled by *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501, 1505 (9th Cir. 1984).[1] And, the decision in *Carpenters v. Russell,* 726 F.2d 1410, 1416 (9th Cir. 1984) settled the Ninth Circuit's view that ERISA § 502(g)(1) [29 U.S.C. § 1132(g)(1)] grants discretion to award attorney's fees to defendant employers who prevail in actions brought by employee benefit plans to collect delinquent contributions.

B. Litigants Are Not Permitted To Contest Settled Law Of The Ninth Circuit In The District Court Or In The Ninth Circuit Except Upon En Banc Review.

In the Ninth Circuit, any three judge panel of the Court of Appeals, as well as any district court, is "bound to follow" earlier decisions of any three judge panel of the Circuit. *Operating Engineers Pension Trust v. Beck Engineering,* 746 F.2d 557, 567-68 (1984); *Mesa Verde Construction Co. v. Laborers,* 820 F.2d 1006, 1013 (9th Cir. 1987) ["we are not permitted to overrule prior panels' interpretations of the Act, even with intervening NLRB case law," and such arguments "should be addressed to the full court in a petition for rehearing en banc"]. After the Ninth Circuit's opinion holding for the Trusts was

---

[1]Since the petition was filed, the Ninth Circuit has ruled that an alleged conflict of interest on the part of a consultant to an employee benefit plan may be raised as an affirmative defense in an action to collect delinquent contributions under ERISA § 515. *Board of Trustees v. California Cooperative Creamery,* ____ F.2d ____, No. 87-2931, Sl.Op. pp. 6606-07 (9th Cir. June 21, 1989). Although Daniel denies that the Seventh Circuit is in conflict with the Ninth Circuit on this important and recurring issue, the Seventh Circuit's *en banc* decision in *Central States Pension Fund v. Gerber Truck Service, Inc.,* 870 F.2d 1148, 1149, 1151-53 (7th Cir. 1989) unequivocally announces a broader rule of decision which precludes defenses pointing to defects in contract formation.

withdrawn and the unpublished memorandum affirmed the judgment for Daniel, the Trusts properly raised broader issues in a petition for rehearing *en banc.* Now the petition for writ of certiorari presents the important issue of jurisdiction and the conflicts among the circuits for resolution by this Court.

C. The Issues Presented By The Petition Are Properly Before This Court, And Review Should Be Granted.

This Court has authority to resolve an issue even when the issue is not raised at the earliest opportunity. *City of Houston v. Hill,* ____ U.S. ____, 107 S.Ct. 2502, 2512, n. 16 (1987) [issue resolved on the merits even though not raised until petition for rehearing *en banc,* and neither majority nor dissent of *en banc* court addressed the issue]. Of course, the issue of jurisdiction may be addressed at any time, "even if not raised by the parties." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 398, 99 S.Ct. 1171, 1175 (1979). The Court is not precluded from addressing the merits of an important, recurring issue squarely presented in the petition, even if not raised in the courts below. *Carlson v. Green,* 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470 (1980). The views of the Ninth Circuit are fully explicated in its decisions settling the issues raised in the petition. The conflicts among the circuits on the jurisdictional issue and on the recurring issues involving interpretation of federal statutes can be resolved only by this Court.

CONCLUSION

Based on the foregoing, the petition should be granted.

Dated: June 27, 1989

Respectfully submitted,

WAYNE JETT,*
JETT & LAQUER
Counsel for Petitioners.
**Counsel of Record.*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

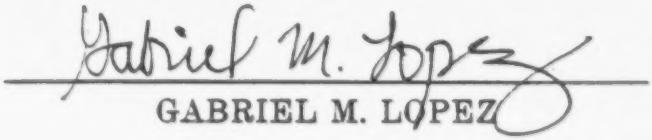
On June 28, 1989, I served the within Reply in Support of Petition for Writ of Certiorari in re: "Operating Engineers Pension Trust, et al. vs. Thomas G. Daniel, an individual doing business as Consolidated Concrete Pumping" in the Supreme Court of the United States, October Term, 1988, No. 88-1892; on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Mark T. Bennett, Esq.
MERRILL, SCHULTZ & WOLDS, LTD.
1855 First Avenue, Suite 100
San Diego, California 92101

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 1989, at Los Angeles, California.



GABRIEL M. LOPEZ